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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GERALD HESTER, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

VISION AIRLINES, INC.,

Defendant.

Case No.: 2:09-CV-00117-RLH-RJJ

**PLAINTIFF GERALD HESTER'S INCORPORATED MEMORANDUM OF
LAW IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT ON VISION
AIRLINES, INC.'S AMENDED COUNTERCLAIMS**

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1 Plaintiff, Gerald Hester ("Hester"), by and through undersigned counsel, respectfully
2 submits his Incorporated Memorandum of Law in Support of his Motion for Summary Judgment
3 on Counterclaimant Vision Airlines, Inc.'s ("Vision") Amended Counterclaims ("Motion").
4 Vision failed to produce, develop, or offer any evidence to support its claim that Hester revealed
5 Vision's confidential information or that Hester disclosed the United States government's
6 classified information. In fact, the very individuals designated to testify as Vision's 30(b)(6)
7 corporate representatives acknowledged that Vision does not have any evidence to support the
8 allegations in its Amended Counterclaims and admitted that Vision does not even possess
9 classified information. These admissions alone demonstrate the frivolous and retaliatory nature
10 of Vision's Amended Counterclaims. Moreover, the very information that Vision alleges that
11 Hester disclosed is information that Vision put into the public record prior to the filing of this
12 lawsuit or which has previously been disclosed by the United States government. Accordingly,
13 the Court should grant Hester's Motion and end Vision's campaign of intimidation against the
14 Class.
15

16 **I. STATEMENT OF UNDISPUTED FACTS**

17 1. The United States government's "War on Terror" in Iraq and Afghanistan has
18 been well documented in the media. On April 1, 2004, Ambassador J. Cofer Black testified
19 before the House International Relations Committee Subcommittee on International Terrorism
20 about the "evolving nature of the al-Qaida organization and the continuing threat that it presents to
21 the United States and [its] allies." (Statement of J. Cofer Black, attached as Ex. 1, at 1.)
22 Ambassador Black testified that, "[f]ollowing the September 11 attacks, we have forcefully
23 applied the Bush doctrine: any person that supports, protects, or harbors terrorists is complicit in
24 the murder of the innocent, and will be held to account. We have done so through our National
25 Strategy to Combat Terrorism, which creates the policy framework for coordinated actions to
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1 prevent terrorist attacks against the United States . . . [by] defeat[ing] terrorist organization[s] of
 2 global reach by attacking their sanctuaries, leadership, finances, and command, control and
 3 communications” (*Id.* at 4.)

4 2. Likewise, the dangers associated with flying into and out of the war zones in Iraq
 5 and Afghanistan are well documented. On November 26, 2004, Slobodan Lekic published an
 6 article on msnbc.com entitled *A Hair-Raising Flight into Baghdad: Commercial Flights from*
 7 *Jordan Offer a Harrowing Trip*. (Slobodan Lekic article, attached as Ex. 2, at 1.) In that article,
 8 Lekic wrote, “[l]ast year [at Baghdad International Airport], a civilian cargo jet was hit after
 9 takeoff with a shoulder-launched missile, and earlier this year a burst of automatic gunfire killed a
 10 passenger aboard an Australian C-130 Hercules transport plane.” (*Id.*) According to Lekic, “[t]o
 11 lessen the threat of being shot at, pilots have adopted a ‘nonstandard approach’ for landings [at
 12 Baghdad International Airport]: They arrive at 15,000 feet and then descend sharply in a stomach-
 13 churning series of tight, spiraling turns that pin passengers deep in their seats.” (*Id.*)

14 3. In the February 2005 edition of Army Magazine, Brigadier General Steven R.
 15 Hawkins and Colonel Gordon M. Wells published an article entitled *Nation Building in*
 16 *Mesopotamia: U.S. Military Engineers in Iraq*. (Brigadier General Hawkins’s article, attached as
 17 Ex. 3, at 17.)¹ In that article, Brigadier General Hawkins and Colonel Wells detailed the
 18 procedures military flights use to fly into Baghdad International Airport. (Ex. 3, at 22.)
 19 Specifically, they wrote, “[a]fter a three-hour flight, the pilots, wearing night vision goggles and
 20 flying in *total blackout conditions, guided their aircraft into a corkscrew descent* and safely
 21 delivered my team at 2:30 in the morning on April 13, at [Baghdad International Airport].” (*Id.*)
 22 (emphasis added.)

23
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 27 ¹ Army Magazine is published by the Association of the United States Army, a private, non-profit
 28 educational organization, and is publicly available on-line. (AUSA About Us Webpage, attached as Ex.
 4.)

1 4. In May 2005, Vision began operating as a subcontractor for the United States
2 government and provided air transport services from various European cities and the United
3 States to Baghdad and Kabul ("Air Bridge Program"). (Deposition of Laura Feigin, attached as
4 Ex. 5, at 13); (Deposition of Brian Dagget, attached as Ex. 6, at 33.)

5 5. As Vision's first Director of Flight Operations, Darrel Jensen ("Jensen"), testified,
6 establishing the Air Bridge Program took considerable effort. (Deposition of Darrel Jensen,
7 attached as Ex. 7, at 13.) In June 2005, Jensen was instructed by William Acor ("Acor"),
8 Vision's Chief Executive Officer, to create the operational framework necessary to establish the
9 Air Bridge Program. (*Id.* at 11-13.) In order to establish the Air Bridge Program, Jensen
10 purchased flight maps from Jeppesen Aviation and contacted United Aircraft Services, a private
11 aircraft handling company located in Dubai ("Dubai Company"), to assist with planning the
12 flight routes from Frankfurt to Baghdad and Kabul and to obtain the required over-flight permits.
13 (*Id.* at 14-15.)

14 6. In order to enter and fly through the air space of countries on its way to Baghdad
15 and Kabul, Vision was required to obtain over-flight permits from those countries. (*Id.* at 16.)
16 Rather than using an aircraft handler in the United States or requesting the United States
17 government to procure these permits, Vision instead relied on the Dubai Company to obtain
18 these over-flight permits for its Air Bridge Program flights (*id.*), which the Dubai Company
19 obtained and filed with the appropriate authorities as a matter of public record in each respective
20 country (*id.* at 20-21). Once the over-flight permits were obtained and filed with the appropriate
21 governmental authorities, the Dubai Company would then, through a non-secure telephone line,
22 send by facsimile those permits to Frankfurt International Airport. (*Id.* at 17.) In addition, the
23 Dubai Company would also send those documents to Jensen's personal hotmail e-mail address.
24 (*Id.* at 16-17.)

1 7. Once Jensen received those documents from the Dubai Company, he would then
2 file the flight plans as public records with the Frankfurt International Airport, which identified
3 Vision's aircraft by its unique tail number – N368CE – and identified Baghdad or Kabul as the
4 final destination for Vision's flights. (*Id.* at 19.)

5 8. Vision's third Director of Flight Operations for the Air Bridge Program, James
6 Maguire ("Maguire") (Deposition of James Maguire, attached as Ex. 8, at 10-11), a current
7 Vision employee, testified before individuals without any security clearances that the Air Bridge
8 Program flights to Kabul utilized certain "procedures," which required them to land with their
9 "lights out" at night (*id.* at 31). The Air Bridge Program flight deck crews on their flight to
10 Kabul received their flight coordinates over an open radio frequency. (Jensen Dep., Ex. 7, at 24.)

11 9. Similarly, since the inception of the Air Bridge Program, the Air Bridge Program
12 crews were required to fly into and out of Baghdad International Airport at night with the cockpit
13 lights turned off. (Maguire Dep., Ex. 8, at 30-31.) In addition to these "procedures," Vision
14 aircraft also use the corkscrew approach to arrive and depart the airport in Baghdad. (*Id.* at 31-
15 32.) The Air Bridge Program crews utilized this procedure to stay within an area protected by
16 the United States military. (*Id.* at 32.) The Air Bridge Program crews received their flight
17 coordinates over an open radio frequency, including their vectoring instructions for the
18 corkscrew descent into and ascent out of Baghdad International Airport. (*Id.*) As Maguire
19 testified, it was common knowledge that all aircraft arriving and departing Baghdad International
20 Airport used the corkscrew procedure. (*Id.*)

21 10. On September 24, 2006, Vision hired Hester as an Air Bridge Program pilot.
22 (Vision Personnel Action Form, attached as Ex. 9.) As a pilot for the Air Bridge Program,
23 Hester was responsible for flying Vision's aircraft into and out of the war zones in Baghdad and
24 Kabul. (Deposition of Gerald Hester, attached as Ex. 10, at 9.)

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11. Shortly after Vision hired Hester, the European Parliament, in a report dated November 16, 2006 and entitled: *On the Companies Linked to the CIA, Aircraft Used by the CIA and the European Countries in which CIA Aircraft have made Stopovers*, identified Vision as working for the United States government and the Central Intelligence Agency. (European Parliament Report dated November 16, 2006, attached as Ex. 11, at 12.) Specifically, under a section of the European Union Parliament Report entitled *Aircraft Used by the CIA for "Extraordinary Renditions"* (*id.* at 10) it stated, "[t]he N368CE is a Boeing 737-300 registered to a shell company called Premier Aircraft Management and incorporated in North Las Vegas, Nevada. Recently, the ownership of the Boeing has shifted from Premier Aircraft Management to a sister company called Vision Airlines." (*id.* at 12.) The report further stated that Vision was operating "CIA flights" and that its aircraft, N368CE, had made "66 stopovers in Germany." (*Id.* at 23.)

12. On January 19, 2007, in an interview with Fox News, then Senator Hillary Clinton discussed her recent flight to Baghdad International Airport. (Interview with Senator Clinton dated January 19, 2007, attached as Ex. 12, at 1.) In that interview Senator Clinton stated, "[w]hen you fly into a war zone like Baghdad, and I've done it numerous times now, there and elsewhere, you know, the C-130 does a kind of corkscrew landing" (*Id.*) In response to Senator Clinton's remark, the Fox News interviewer stated, "[h]air-raising, that flight – I mean that corkscrew – I mean, I always hear descriptions of that corkscrew landing" (*Id.*)

13. Nearly six months after Hester's employment at Vision began, Acor informed Hester on March 1, 2007, that he was required to sign a Non-Compete and Non-Disclosure Agreement ("Non-Disclosure Agreement") with Vision. (Non-Disclosure Agreement, attached as Ex. 13); (Hester Dep., Ex. 10, at 106.) Acor informed Hester that if he did not sign the Non-

1 Disclosure Agreement that his employment with Vision would be terminated immediately. (Hester
2 Dep., Ex. 10, at 106.) Accordingly, Hester executed the Non-Disclosure Agreement on March 1,
3 2007. (Non-Disclosure Agreement, Ex. 13, at 4.)

4 14. Pursuant to the Non-Disclosure Agreement, the non-disclosure provision states:

5 During employment, and thereafter, Employee shall not, directly or
6 indirectly, voluntarily or involuntarily, disclose to any person or entity
7 any Confidential Information of Employer. For the purposes of this
8 Agreement, "Confidential Information" shall include, but is not limited
9 to, any of Employer's confidential, proprietary or trade secret
10 information disclosed to Employee or Employee otherwise learns in the
11 course of employment such as, but not limited to, business plans,
12 customer lists, customer names, customer contact information, price lists,
13 financial statements, software diagrams, flow charts and product plans.

14 (*Id.* at 2.)

15 15. Hester also received and signed an Employee Acknowledgement Form on March
16 1, 2007, that stated that he had reviewed Vision's Employee Handbook. (Hester's Employee
17 Acknowledgement Form, attached as Ex. 14.) Vision's Employee Handbook states under the
18 section entitled "Employment At-Will" the following: "The employment relationship between
19 Vision Airlines and its employees is at-will and may be terminated by either party at any time."
20 (Employee Handbook attached as Ex. 15, at Section 2 at 2.) The Employee Acknowledgement
21 Form that Hester executed stated that, "I understand that the policies in this Employee Handbook
22 in no way modify my status as an at-will employee and in no way imply, infer or guarantee my
23 continued employment for any definite term *The language used in these policies is not
24 intended to constitute a contract of employment, either expressed or implied.*" (Hester's
25 Acknowledgement Form, Ex. 14, at 1.) (emphasis added.) Furthermore, the Employee
26 Acknowledgement Form states, "[t]his Handbook should not be construed, nor does it constitute,
27 any kind of 'employment contract,' . . . Nothing in this Employee Handbook creates or is
28 intended to create a promise or representation of continued employment. All employment with

1 the Company is at-will . . . Employment at-will is the sole and entire agreement between the
2 company and you concerning the duration of your employment and the circumstances under
3 which your employment may be terminated.” (*Id.*)

4 16. Nearly one year after his employment as a pilot on the Air Bridge Program began
5 (and after numerous flights into and out of the war zones), Hester on July 25, 2007, executed a
6 Classified Information Nondisclosure Agreement. (Classified Information Nondisclosure
7 Agreement, attached as Ex. 16, at 2.) The Classified Information Nondisclosure Agreement
8 states that it is, “An Agreement Between Gerald George Hester and the United States.” (*Id.* at
9 1.) Hester executed the Classified Information Nondisclosure Agreement while Vision was a
10 subcontractor for McNeil Technologies, Inc. (“McNeil”). (McNeil Affidavit, attached hereto as
11 Ex. 17, at 1.)
12

13 17. In a memorandum from Maguire to Vision’s Air Bridge Program pilots dated
14 October 15, 2007, Vision informed its pilots about its new compensation scheme, which would
15 have a retroactive effect (“Vision 767 Memorandum”). (Vision’s October 15, 2007 Pay
16 Memorandum to its Pilots, attached as Ex. 18.) Hester received a copy of the Vision 767
17 Memorandum which he signed and acknowledged receipt of on November 9, 2007. (*Id.* at p. 2.)
18

19 18. On May 5, 2008, Vision filed suit in the Circuit Court for Fairfax County,
20 Virginia, against CSC and Capital Aviation, the companies that initially contracted with Vision
21 to operate the Air Bridge Program, for failure to pay certain parts of Vision’s invoices for weeks
22 54 and 55 of the Air Bridge Program. (Vision’s Fairfax County Complaint, attached as Ex. 19.)
23

24 19. Vision publicly filed its Bill of Particulars on August 8, 2008, in which it stated,
25 “[s]hortly after the September 11, 2001, terrorist attacks, CSC’s predecessor-in-interest,
26 DynCorp International, retained Vision to provide sensitive air transportation services for a
27 certain United States government entity.” (Vision’s Bill of Particulars, attached as Ex. 20, at 1.)
28

1 Vision's Bill of Particulars further stated that, "[a]t CSC's request and for CSC's benefit, Vision
2 signed an agreement with Capital [Aviation], effective as of October 1, 2005, and ending July
3 31, 2005 ("2005 Contract"). (*Id.* at 2.) Vision attached, as an exhibit to its Bill of Particulars, a
4 complete and non-redacted copy of its 2005 contract with Capital Aviation, which it filed as a
5 matter of public record with the court in Fairfax County. (*Id.*)

6
7 20. Vision's Bill of Particulars explained the type of services that Vision provided to
8 the United States government pursuant to its contract with Capital Aviation. (*Id.*) "The 2005
9 Contract required Vision to use a single aircraft to provide airline service between Frankfurt,
10 Germany and Kabul Afghanistan, and between Frankfurt, Germany and Baghdad, Iraq, for
11 certain fixed amounts – *i.e.*, \$1,100,000 for eight rotations per month between Frankfurt and
12 Kabul (plus \$87,500 for a ninth rotation if required in any month); and \$444,000 for four
13 rotations per month between Frankfurt and Baghdad (plus \$111,000 for a fifth rotation if
14 required in any month)." (*Id.*)

15
16 21. In Vision's Bill of Particulars, however, Vision claimed that "[s]oon after the
17 2005 Contract was finalized, the parties abandoned it and changed the terms of their agreement
18 materially." (*Id.*) "At the request of CSC, Vision began flying to Baghdad and Kabul from
19 Washington, DC, instead of Frankfurt, Germany." (*Id.*) Vision also explained the new
20 compensation scheme under this agreement with Capital Aviation and CSC. (*Id.*) "CSC
21 requested, and Vision agreed, to adopt a new three-part payment formula, consisting of a fixed
22 component, a variable component, and certain 'other direct costs.'" (*Id.* at 3.) Specifically, as
23 alleged by Vision, the new compensation formula was structured so that Vision would receive
24 the following:
25
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(a) Under the new agreement, Vision was to receive a fixed amount of \$499,000 per week regardless of the number of flights. The fixed component was intended to compensate Vision for the costs of making the aircraft available for the CSC Program. It covered, for example, aircraft lease/debt service, insurance, flight deck and cabin crew expenses, crew training, and general and administration costs.

(b) The variable cost was set at \$3,963 per 'block hour.' This amount compensated for costs that would vary depending on the use of the aircraft. The 'block hour' price would cover fuel costs, maintenance reserves, interior and exterior conditions, flight planning, weather-related costs, etc.

(c) The 'other direct costs' were certain incidental charges that would be passed through to CSC/Capital at cost plus 10%. They included catering charges, landing fees, parking costs, ground handling charges, deicing costs, overflight permits, fuel surcharges, ground transportation, and crew hotel expenses.

(*Id.* at 3.)

22. Vision also stated in its Bill of Particulars that when a new Request for Proposal for the Air Bridge Program contract was issued by the United States government, Vision "partnered with another entity, McNeil Technologies, to submit such a proposal." (*Id.* at 5.) According to Vision, "the United States government awarded the new contract, effective as of August 1, 2007, to Vision and McNeil, not to CSC or Capital." (*Id.*)

23. Thus, in Vision's Bill of Particulars, Vision identified the following: (1) that it was a subcontractor for the United States government; (2) that it operated "sensitive air transportation services" on behalf of the United States government from Frankfurt, Germany, and Washington, DC, to Kabul and Baghdad; (3) that it contracted with Capital Aviation, CSC, and McNeil; and (4) disclosed all of the financial terms of its agreements with Capital Aviation and CSC. (*Id.* at 1-5.)

24. On August 4, 2008, Vision terminated Hester's employment because he was over the age of 65. (Vision Personnel Action Form, Ex. 9.)

25. On January 20, 2009, Hester filed a class action Complaint against Vision seeking

1 to recover hazard pay that Vision collected from the upstream contractors on behalf of the Air
 2 Bridge Program employees. [D.E. 1.] The Complaint in this action contained the following
 3 statements:

4 After September 11, the United States government implemented a global strategy
 5 designed to eradicate terrorist organizations that threatened the security of the United
 6 States and its allies; [*Id.* at ¶ 7.]

7 [A]ircraft arriving and departing Baghdad must utilize a dangerous corkscrew
 8 procedure, which requires the airplane to fly in a spiral directly above the airport in
 9 order to stay within the areas most heavily fortified by the United States military; and
 10 [*Id.* at ¶ 11.]

11 [T]o reduce the likelihood of rocket and missile attacks, aircraft arriving and departing
 12 Baghdad International Airport must observe blackout procedures which require all
 13 exterior and interior aircraft lighting (except for cockpit instruments) to be turned off;
 14 [*Id.* at ¶ 11.]

15 26. Vision claims that this information constitutes Vision's confidential information
 16 or that this information is otherwise classified. [D.E. 88 at ¶¶ 12, 13, 14.]

17 27. However, as Hester testified, the only information contained in the Complaint that
 18 he provided to his attorneys was the information contained in paragraph 2 of the Complaint,
 19 which was his own personal background information. (Hester Dep., Ex. 10, at 181.) Hester
 20 testified that the information contained in the Complaint, other than the background information
 21 contained in paragraph 2, was developed by Class counsel. (*Id.* at 179-81.)

22 28. After the Complaint in this action was filed, certain articles were published in the
 23 Las Vegas Sun about this litigation. (*Id.* at p. 209.) One of those articles dated January 23, 2009
 24 ("Las Vegas Sun Article"), contained the following statements from an anonymous source:

25 [H]e said the purpose of the flights was to ferry personnel to and from antiterrorism
 26 and military operations. The passengers typically included CIA and State Department
 27 personnel along with employees of private security contractor Blackwater; and

28 The pilot, who said one flight outside of Kabul came under machine-gun fire that
 missed his plane, said all of the landings and takeoffs in the war zones were done at
 night using tight, difficult approaches and departures for security reasons. (ACC ¶ 16.)

1 (Las Vegas Sun Article dated January 23, 2009, attached hereto as Ex. 21, at 1.)

2 29. Vision has repeated these statements and alleged without support, in unsealed
3 pleadings, that this information is confidential or classified. [D.E. 88 ¶ 12.]

4 30. Hester testified that he “has never spoken with any reporter from the Las Vegas
5 Sun or any other newspaper” regarding “Vision Airlines.” (Hester, Dep., Ex. 10, at 209-10.)
6 Furthermore, Hester testified that he did not know who would have spoken to the press or who
7 was the Las Vegas Sun’s anonymous source. (*Id.* at 210.)

9 31. During this litigation, Vision offered two 30(b)(6) corporate representatives to
10 testify as to Vision’s Amended Counterclaims against Hester. (Dagget Dep., Ex. 6, at 27-28.)
11 Brian Dagget (“Daggett”), Vision’s Air Bridge Program Manager, was one of the individuals
12 that Vision put forward with knowledge of its Amended Counterclaims against Hester. (*Id.*)

13 32. Paragraph 10 of Vision’s Amended Counterclaims states:

14
15 During his employment with Counterclaimant Vision and thereafter,
16 Counterdefendant Hester has been directly and/or indirectly contacting
17 Capital Aviation, Inc., Computer Sciences Corporation and McNeil
18 Technologies, Inc., sometimes directly and sometimes indirectly, and
19 discussing confidential and trade secret information of Counterclaimant
20 Vision and attempting, in part, to convince such customers, contractors
21 and business associates of Counterclaimant Vision to enter into new
22 contracts with Counterdefendant Hester and/or others related to
23 Counterdefendant Hester and terminating contracts with Counterclaimant
24 Vision and/or interfering with contracts with Counterclaimant Vision all
25 to the detriment of Counterclaimant Vision.

26
27 With respect to this paragraph, Daggett testified that Vision “did not have anything” to support
28 this allegation. (*Id.* at 128.)

33. Paragraph 11 of Vision’s Amended Counterclaims states:

1 Counterdefendant Hester has also released or discussed confidential and
2 trade secret information to the press or public at large in an attempt to
3 defame, harass and annoy Counterclaimant Vision enough that Capital
4 Aviation, Inc., Computer Sciences Corporation and McNeil
5 Technologies, Inc. and possibly other customers, contractors and
6 business associates would breach or fail to renew their contracts or
7 business associations with Counterdefendant Hester and/or associates or
8 affiliates of Counterdefendant Hester, and further conducts such acts in
9 an improper attempt to obtain monies from Counterclaimant Vision.

10 Dagget testified that the only information Vision had that supported this paragraph was the
11 statements contained in the Las Vegas Sun Article. (*Id.* at 139.)

12 34. Furthermore, Dagget testified that he did not have any information or evidence
13 that Hester was the anonymous source quoted in the Las Vegas Sun Article. (*Id.* at 141.) The
14 only information Dagget could offer to support Vision's allegation that Hester was the
15 anonymous source for the Las Vegas Sun Article was that the article was published after Hester
16 filed his lawsuit. (*Id.* at 155.) There is no evidence in the record in this case that Hester is the
17 source quoted in the Las Vegas Sun Article.

18 35. Dagget also testified that the only information that Vision claimed was
19 confidential was that Vision operated flights to Baghdad and Kabul. (*Id.* at 135.) Dagget,
20 however, was unaware of any other confidential information that had been allegedly released by
21 Hester, other than the destinations of the Air Bridge Program flights. (*Id.* at 136.)

22 36. Furthermore, other than the fact that Hester filed a Complaint against Vision,
23 Dagget testified that as to paragraphs 12, 13, 14, 15, 16, 17, and 18 of Vision's Amended
24 Counterclaims that Vision did not have any information that supported its allegations. (*Id.* at
25 154-157.)

26 37. Similarly, David Meers testified as Vision's 30(b)(6) witness on Vision's
27 Amended Counterclaims. (Deposition of David Meers, Ex. 22, at 283-84.) Meers testified that
28 other than the Las Vegas Sun Article, he was unaware if Vision had any evidence to support the

1 allegations contained in Vision's Amended Counterclaims. (*Id.* at 521.)

2 38. Dagget also testified that since his employment at Vision began in February 2007
3 (Dagget Dep., Ex. 6, at p. 9), Vision has not been in possession of any classified information and
4 does not have any procedures to handle or store classified material. (*Id.* at 119).

5 39. For the period prior to Dagget's employment, the Closeout Certification of the Air
6 Bridge Program Contract stated that "Classified material ____ was ____X____ was not furnished by
7 Contractor or developed by Subcontractor under this Document." (Capital Aviation Closeout
8 Certificate, attached as Ex. 23, at CAI 25530.)

9 40. Furthermore, Vision acknowledged in its Response to Plaintiff's Second Set of
10 Interrogatories that none of its contracts have been cancelled as a result of the Class's lawsuit,
11 and it failed to identify any specific damages that it sustained as a result of that lawsuit.
12 (Vision's Response to Plaintiff's Second Set of Interrogatories, attached as Ex. 24, at 12.)

13 II. ARGUMENT

14 "Summary judgment is proper 'if the pleadings', depositions, answer to interrogatories,
15 and admission on file, together with the affidavits, if any, show that there is no genuine issue as
16 to any material fact and the moving party is entitled to judgment as a matter of law.'" *Slumier v.*
17 *Verity, Inc.*, 606 F.3d 584, 586 (9th Cir. 2010) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317,
18 323 (1986)). Once the moving party files its motion for summary judgment, the non-moving
19 party must "designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477
20 U.S. at 324. Here, the Class has demonstrated that summary judgment is appropriate on Vision's
21 Amended Counterclaims for breach of the "confidentiality and non disclosure agreements"
22 (Count I), injunctive relief (Count II), and declaratory relief (Count III), because Vision has
23 failed to offer any evidence to support the elements for each cause of action and there are no
24 material facts in dispute.

1 A. **VISION LACKS STANDING TO SUE HESTER FOR ANY ALLEGED**
2 **BREACH OF THE CLASSIFIED INFORMATION NONDISCLOSURE**
3 **AGREEMENT**

4 As a threshold matter, Vision lacks standing to sue Hester for any alleged breach of the
5 Classified Information Nondisclosure Agreement because Vision is not a party to that contract.
6 “A person who is not a party to a contract . . . cannot sue to enforce the contract.” *Am.*
7 *Monument Found., LLC, v. Fairbrother*, 2006 WL 3063473, at *8 (D. Nev. Oct. 24, 2006); *see*
8 *also Wyatt v. Bowers*, 747 P.2d 881, 882 (Nev. 1987) (holding that individuals not parties to or
9 recipients of a particular promise cannot sue to enforce breach of that covenant); *Olson v.*
10 *Iacometti*, 533 P.2d 1360, 1364 (Nev. 1975) (“Before a stranger can avail himself of the
11 exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must,
12 at least, show that it was intended for his direct benefit.”). Here, the Classified Information
13 Nondisclosure Agreement executed by Hester states that it is “AN AGREEMENT BETWEEN
14 Gerald George Hester AND THE UNITED STATES.” (Ex. 16 at 1) (emphasis in original). The
15 plain language of the Classified Information Nondisclosure Agreement makes clear that Vision is
16 not a party to it. Therefore, Vision lacks standing to sue Hester for any alleged breach of it. *See*
17 *Wyatt*, 747 P.2d at 882; *Olson*, 533 P.2d at 1364.²

19 B. **VISION FAILED TO OFFER ANY EVIDENCE THAT HESTER**
20 **DISCLOSED CLASSIFIED INFORMATION**

21 Even assuming that Vision did have standing to sue for a breach of the Classified
22 Information Nondisclosure Agreement, Vision failed to offer any evidence that Hester disclosed
23 classified information. Vision argues that paragraphs 7 and 11 of the Class’s Complaint contain

24
25 ² Furthermore, counsel for Hester was unable to locate a single case where a party, other than the United States
26 government, sued an individual or entity for breach of the Classified Information Nondisclosure Agreement. Of
27 course, this follows logically because only the United States government has an ownership interest in its classified
28 information, only designated employees of the United States government can actually classify a piece of
information, and the United States government has its own procedures for protecting its classified information
including the penalties for breach of the Classified Information Nondisclosure Agreement set forth in Title 18 of the
United States Criminal Code.

1 classified information and that the anonymous source cited in the Las Vegas Sun Article
 2 divulged classified information.³ Vision, however, failed to offer any evidence to support its
 3 claim that this information is classified, or that Hester is the source of any of it. Of course,
 4 Vision has offered no evidence because it is neither classified nor confidential. Furthermore, the
 5 information contained in the Complaint and the Las Vegas Sun Article have been so widely
 6 disseminated in the public domain that such information could not possibly be classified.⁴
 7

8 *i. Vision failed to provide any support for its claim that the information*
 9 *contained in either the Complaint or the Las Vegas Sun Article is*
 10 *classified.*

11 Vision claims that certain information contained in paragraphs 7 and 11 of the Complaint
 12 are classified. In particular, Vision points to the following statements: (1) the United States
 13 government embarked on a global strategy to eradicate terrorism after the September 11, 2001
 14 attacks; (2) aircraft arriving and departing Baghdad International Airport utilize a corkscrew
 15 procedure; and (3) aircraft arriving at Baghdad International Airport do so at night without any
 16 cockpit lighting to avoid attacks from insurgents. In addition, Vision argues that the statements
 17 contained in the Las Vegas Sun Article that Vision transported CIA, Blackwater, and State
 18 Department personnel and that Vision aircraft had to use tight approaches into and out of the war
 19 zones was also classified. Vision, however, failed to offer any evidence that this information is
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21 ³ That Vision knowingly made these allegations in publicly filed documents, thereby confirming the allegedly
 22 classified nature of this information, may itself be a breach by the company. *Cf. Gerstein v. CIA*, 2008 WL
 23 4415080 (N.D. Cal. Sept. 26, 2008) (quoting declaration on behalf of CIA expressing concern about public
 24 confirmation of classified facts). Of course, Vision knows that the information in the Complaint is public
 25 knowledge and in no way classified, and thus feels free to discuss this issue in the open.

26 ⁴ Vision's continual claim that Plaintiff disclosed classified information is baseless. Vision has completely and
 27 utterly failed to substantiate its claim despite repeated opportunities to identify to this Court the classified
 28 information that it claims Hester divulged. Shortly after filing this lawsuit, Vision's counsel contacted counsel for
 Plaintiff and insisted on filing a motion to seal the Complaint, allegedly because it contained classified material
 [D.E. 6]. Plaintiff agreed to this motion in good faith, even though Plaintiff was certain that the Complaint
 contained only publicly available information. Plaintiff asked only that Vision produce support for its position about
 the classified nature of the information in the Complaint. Vision never did so, and the Court *sua sponte* unsealed the
 Complaint.

1 actually classified.

2 Rather, Vision's current Air Bridge Program Manager, Dagget, testified that since his
3 employment at Vision began in February, 2007 (Dagget Dep., Ex. 6, at 9), Vision has not been in
4 possession of any classified information and does not have any procedures to handle or store
5 classified material (*id.* at 119). For the period prior to Dagget's employment, the Closeout
6 Certification for the Air Bridge Program Contract stated that "Classified material ____ was
7 ____ X was not furnished by Contractor or developed by Subcontractor under this Document."
8 (Capital Closeout Certificate, Ex. 23, at CAI 25530.) Thus, Vision has not been in possession of
9 any classified information during any period of the Air Bridge Program and was unable to
10 provide its employees, including Hester, with any classified information.⁵

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13 *ii. The information contained in the Complaint and the Las Vegas Sun Article
has been so widely disseminated that it cannot be classified.*

14 The information contained in the Complaint and the Las Vegas Sun Article fails to
15 constitute a disclosure of classified information because this information is widely disseminated
16 in the public domain. "Information related to the national defense typically cannot qualify as
17 such if it is in the public domain; it must be closely held by the government." *See United States*
18 *v. Rosen*, 445 F. Supp. 2d 602, 620 (E.D. Va. 2006). Furthermore, information is not classified
19 where it "has been so widely circulated and is so generally believed to be true, that confirmation
20 by one in a position to know would add nothing to its weight." *Alfred A. Knopf, Inc. v. Colby*,
21 509 F.2d 1362, 1370-71 (4th Cir. 1975). For example, in *United States v. Heine*, 151 F.2d 813,
22 817 (2d Cir. 1945), the Second Circuit Court of Appeals overturned a conviction under various
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25 ⁵ The instruction to use the corkscrew procedure at Baghdad International Airport was transmitted over an open
26 radio frequency to Vision's Air Bridge Program pilots and it was also common knowledge that this procedure was
27 used by aircraft arriving and departing Baghdad. (Maguire Dep., Ex. 8, at 32.) Moreover, Maguire testified about
28 this information before individuals that do not have a security clearance and never once indicated that it was
classified (*id.* at 31-32), even though Maguire did refuse to discuss his employment history prior to his work at
Vision based on his belief that it might be classified (*id.* at 24-25). Surely if this information was classified,
Maguire would not have discussed it during his deposition.

1 portions of the Espionage Act because supposedly classified information was made publicly
 2 available by the United States government. The court held, “it is obviously lawful to transmit
 3 any information about weapons and munitions of war which the [Armed Services] had
 4 themselves made public; and if that be true; we can see no warrant for making a distinction
 5 between such information, and information which the services have never thought it necessary to
 6 withhold at all.” *Id.*; see also *United States v. Truong Dinh Hung*, 629 F.2d 908, 918 n.9 (4th Cir
 7 1980) (noting that district court’s instruction to jury was proper where it stated that “the
 8 defendants would not be guilty of transmitting national defense information if the information
 9 were available in the public domain”). Here, each allegedly classified piece of information can
 10 be traced to a public source.

11
 12 The Complaint did not disclose any classified information by stating that aircraft use the
 13 corkscrew procedure to arrive and depart Baghdad International Airport, because such
 14 information is widely disseminated in the public domain. First, the Complaint never stated that
 15 Vision aircraft use this procedure, but instead that “aircraft arriving and departing” the war zone
 16 do so. [D.E. 1 at ¶ 11.] Second, the fact that aircraft use the corkscrew procedure to arrive and
 17 depart Baghdad International Airport is information widely disseminated in the public domain by
 18 the United States government and various news outlets. Then-Senator Hillary Clinton stated in
 19 an interview with Fox News that “[w]hen you fly into a war zone like Baghdad, and I’ve done it
 20 numerous times now, there and elsewhere, you know, the C-130 does a kind of *corkscrew*
 21 *landing . . .*” (Clinton interview, Ex. 12, at 1) (emphasis added.) (*See also* Brig. Gen. Steven
 22 Hawkins and Col. Gordon Wells September 2005 article in Army Magazine, Ex. 3, at 22) (“After
 23 a three-hour flight, the pilots, wearing night vision goggles and flying in *total blackout*
 24 *conditions, guided their aircraft into a corkscrew descent* and safely delivered my team at 2:30
 25 in the morning on April 13, at [Baghdad International Airport].”) (emphasis added); (Lekic
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1 article, Ex. 2, at 1) (“To lessen the threat of being shot at, pilots have adopted a ‘non-standard’
 2 approach for landing [at Baghdad International Airport]: They arrive at 15,000 feet and then
 3 descend sharply in a stomach-churning *series of tight, spiraling turns* that pin passengers deep in
 4 their seats.”) (emphasis added). Accordingly, the information in paragraph 11 of the Complaint
 5 is not classified because it has been discussed in the public domain by a Senator of the United
 6 States, a United States Army Brigadier General and Colonel, and by countless newspaper
 7 reports. *See Heine*, 151 F.2d at 817. The United States government is making no effort to keep
 8 this information confidential, and Vision has no authority to classify it on its own.

10 Vision also contends that the allegation contained in paragraph 7 of the Complaint, which
 11 states after the September 11, 2001 attacks that the United States government embarked on a
 12 global strategy to eradicate terrorism, is also classified. Again, this information has been disclosed
 13 by the United States government and therefore cannot be classified. *See Heine*, 151 F.2d at 817.
 14 For example, on April 1, 2004, Ambassador J. Cofer Black testified before the House International
 15 Relations Committee Subcommittee that:

17 Following the September 11 attacks, we have forcefully applied the Bush
 18 doctrine: any person that supports, protects, or harbors terrorists is
 19 complicit in the murder of the innocent, and will be held to account. We
 20 have done so through our National Strategy to Combat Terrorism, which
 21 creates the policy framework for coordinated actions to prevent terrorist
 22 attacks against the United States . . . [by] defeat[ing] terrorist
 23 organization[s] of global reach by attacking their sanctuaries, leadership,
 24 finances, and command, control and communications . . .

22 (Statement of Ambassador Black, Ex. 1, at 4.) Again, the United States government
 23 intentionally disseminated this information into the public domain, and as such it cannot be
 24 considered classified. *See Heine*, 151 F.2d at 817. Regardless, however, Hester never provided
 25 any of the information contained in the Complaint, other than the information that related to his
 26

background contained in paragraph 2. (Hester Dep., Ex. 10, at 181.)⁶

C. THE VISION 767 MEMORANDUM DOES NOT CONSTITUTE AN EMPLOYMENT CONTRACT

Vision has lumped into its Amended Counterclaims the Vision 767 Memorandum setting out the pay scales of its flight and cabin crews during Phase IV of the Air Bridge Program. The Vision 767 Memorandum contains no provisions governing confidential or classified information, and in no way informs the allegations of breach set forth in the Amended Counterclaims. Thus, the Court need not decide the legal status of the Vision 767 Memorandum in order for Plaintiff to prevail as to the Amended Counterclaims, as it is irrelevant to the merits of the Amended Counterclaims. Nonetheless, because this issue has been raised by Vision before in other contexts, Plaintiff will address it briefly here.

The Vision 767 Memorandum does not constitute an employment contract for four reasons: (1) it is a communication and not a contract; (2) it fails to establish any obligations between the parties; (3) Hester's at-will employment status precludes any contractual rights from arising between Vision and Hester based on the Vision 767 Memorandum; and (4) Vision's Employee Handbook prevents any contractual relationship from forming between Hester and Vision based on the Vision 767 Memorandum.

i. The Vision 767 Memorandum is a communication and not a contract.

"Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2005). The Vision 767 Memorandum does not constitute an employment contract because there was no

⁶ The information contained in the Las Vegas Sun Article, which reports that Vision transported CIA, Blackwater, and State Department personnel on its flights and that the Air Bridge Program flights use tight procedures at night to land, is also in the public domain. See European Parliament report dated November 16, 2006 and entitled: *On the Companies Linked to the CIA, Aircraft Used by the CIA and the European Countries in which CIA Aircraft have made Stopovers*. (EU Report, Ex. 11, at 10, 12, 23.) Nonetheless, Hester testified that he was not the anonymous source cited in the Las Vegas Sun Article (Hester, Dep., Ex. 10, at 209-10), and Vision has offered and can offer no evidence to the contrary (Dagget Dep., Ex. 6, at 154-157).

offer and acceptance, meeting of the minds, or consideration between Hester and Vision. The Vision 767 Memorandum is a communication between Hester and Vision, in which Vision notified Hester about certain revisions it unilaterally made to its employment policies fifteen days earlier. (*See* Vision 767 Memorandum, Ex. 18, at 1.)

As such, Hester could not accept or reject Vision's policy revisions. *See Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 105-06 (Nev. 2008) (holding that memorandum revising employment policies was not a contract). Moreover, the communicative nature of the Vision 767 Memorandum is further reflected in the language above Hester's signature block, which states, "I have read and acknowledge receipt of the memo regarding the Revised Pay Structure & Guidelines for Boeing Pilots that went into effect on October 1, 2007." (Vision 767 Memorandum, Ex. 18, at 2.) As Maguire testified, he never negotiated the terms of the Vision 767 Memorandum with any of the employees (Maguire Dep., Ex. 8, at 81), there was no place on the Vision 767 Memorandum for Vision to sign (*id.* at 84-85), and nowhere on the Vision 767 Memorandum does it state that it is a contract (*id.* at 85). Accordingly, Hester merely acknowledged receipt of the Vision 767 Memorandum and did not agree to be bound by those terms any more than Vision was bound by the policy revisions it implemented. (*See* Vision 767 Memorandum, Ex. 18.)

ii. *A communication is not a contract where it does not imply obligations on behalf of the parties.*

A communication does not constitute a contract where it does not imply obligations on behalf of the parties. *See United Services Auto Ass'n. v. Shlang*, 894 P.2d 967, 971-72 (Nev. 1995). For example, in *Barelli v. Barelli*, 944 P.2d 246, 250 (Nev. 1997), the Nevada Supreme Court determined that a letter which stated that plaintiff is "currently and will continue on into the future as a salaried employee of this company at the same rate of pay and position" failed to constitute a contract because it did not impose any obligation on the plaintiff. *Id.* Similarly, the

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Vision 767 Memorandum fails to constitute a contract because it does not impose any obligations on either Vision or Hester. *See id.* While the Vision 767 Memorandum outlines new “policies” with respect to “salary structure,” “training,” “crew movement,” “transportation,” “hotel accommodations,” and “per diem,” it does not impose any obligations on Vision to honor these policies with regards to Hester or preclude Vision from altering these policies at any time, at its discretion, as to Hester in the future. (Vision 767 Memorandum, Ex. 18, at 2.) On the contrary, it merely explains the policies in effect as of October 1, 2007 and for an undetermined time thereafter. Furthermore, the Vision 767 Memorandum did not impose any obligations on Hester, as he was not required to continue working for Vision nor was Vision required to employ Hester for a definite period of time. Therefore, like the letter in *Barelli*, the Vision 767 Memorandum fails to impose any obligations on the parties, and is not a contract. *See also Shlang*, 894 P.2d at 971-72 (holding that a letter failed to constitute a contract because it did not impose any obligations on the parties even though the letter identified the items to be purchased, quantities, and price).

iii. *Hester’s at-will employment status precludes any contractual rights from arising between Vision and Hester based on the Vision 767 Memorandum.*

Hester’s at-will employment status precludes any contractual rights from arising between Vision and Hester based on the Vision 767 Memorandum. An employment relationship in Nevada is either at-will or governed by an employment contract. *See Ringle v. Bruton*, 86 P.3d 1032, 1037 (Nev. 2004). However, “at-will employees have no contractual rights arising from the employment relationship that limit the employer’s ability to prospectively hire and fire employees, and to change the terms of employment.” *Baldonado*, 194 P.3d at 106. Thus, the Nevada Supreme Court endorsed the district court’s holding in *Baldonado* that a group of employees’ “at-will . . . status precluded any challenge to the employment policy on breach of contract grounds.” *Id.* at 98, 105 n.39.

1 There, table dealers at the Wynn Las Vegas sued the casino for breach of contract based
 2 on a memorandum the casino sent its employees which revised certain employment policies. *Id.*
 3 at 98. Specifically, the memorandum changed the tip policy for the table dealers and required
 4 them to share their tips with certain lower level management personnel. *Id.* The court held that
 5 the memorandum failed to constitute a contract, because the communication merely informed the
 6 casino's employees about the change in employment policies. *See id.* at 98, 105-06.
 7 Accordingly, a memorandum revising certain employment policies cannot form the basis of an
 8 employment contract that gives rise to a breach of contract claim. *See id.*

10 Similar to the employees in *Baldanado*, Vision's breach of contract claim fails because
 11 Hester's "at-will . . . status precludes any challenge to the employment policy on breach of
 12 contract grounds." *See id.* at 106. Vision thus could not bring a breach of contract claim based
 13 on the Vision 767 Memorandum, a communication that only informed Hester about certain
 14 changes to Vision's employment policies. Put another way, the Vision 767 Memorandum cannot
 15 form the basis of a contract that Hester could breach. *See id;* *see also Martin v. Sears, Roebuck*
 16 *& Co.*, 899 P.2d 551, 554 (Nev. 1995) (holding that "[s]ince a claim arising from breach of
 17 contract has no application to at-will employment, and [plaintiff] has not demonstrated that he
 18 was other than an at-will employee, a breach of contract cause of action will not lie").

21 iv. *Vision's Employee Handbook prevents any contractual relationship from*
 forming between Vision and Hester.

22 Vision's Employee Handbook prevents any contractual relationship from forming
 23 between Vision and Hester. "In Nevada, at-will employment is presumed in the absence of a
 24 written employment agreement." *See Ringle*, 86 P.3d at 1036. The at-will presumption may be
 25 rebutted if "a preponderance of the evidence [demonstrates] that there was an express or implied
 26 contract of employment" *Southwest Gas. Corp. v. Vargas*, 901 P.2d 693, 697 (Nev. 1995).
 27 However, a company may prevent any "implied contractual liability from arising . . . by

1 including a disclaimer in their employee handbooks.” *Id. See also D’Angelo v. Gardner*, 819
 2 P.2d 206, 209 n.4 (Nev. 1991) (holding that an employer can easily prevent an employment
 3 contract from arising by “including in its handbook an express disclaimer of implied contractual
 4 liability”).

5 Vision specifically limits any contractual liability from arising between Vision and any of
 6 its employees based on the Vision 767 Memorandum because it incorporates by reference the
 7 Vision Employee Handbook into the Vision 767 Memorandum. (See Vision 767 Memorandum,
 8 Ex. 18, at 2.) Vision’s Employee Handbook states, “Employment At-Will: The employment
 9 relationship between Vision Airlines and its employees is at-will and may be terminated by
 10 either party at any time.” (Vision’s Employee Handbook, Ex. 15, Section 2 at 2.) In case of any
 11 confusion, Vision includes in its Employee Handbook a statement that:
 12

13 I understand that the policies in this Employee Handbook in no way
 14 modify my status as an at-will employee and in no way imply, infer or
 15 guarantee my continued employment for any definite term . . . [Vision]
 16 reserves the right to modify, revoke, suspend, terminate, interpret, or
 17 change any or all portions of these policies with or without notice. The
 18 language used in these policies is not intended to constitute a contract of
 19 employment, either express or implied.

20 (*Id.* at Employee Signature Page.) Vision’s Employee Handbook also states:

21 All employment with [Vision] is at-will. You have the right to terminate
 22 your employment at any time, with or without cause or notice, and
 23 [Vision] has a similar right. Employment at-will is the sole and entire
 24 agreement between [Vision] and you concerning the duration of your
 25 employment and the circumstances under which your employment may
 26 be terminated.

27 (*Id.* at Employee Signature Page.)

28 Hester received a copy of the October 2006 Employee Handbook (Hester Dep., Ex. 10, at
 84) and executed an Employee Acknowledgement Form. (Employee Acknowledgement Form,
 Ex. 14.) The Employee Acknowledgement Form that Hester executed stated:

1 I understand that the policies in this Employee Handbook in no way
 2 modify my status as an at-will employee and in no way imply, infer or
 3 guarantee my continued employment for any definite term . . . *The*
 4 *language used in these policies is not intended to constitute a contract of*
 5 *employment, either expressed or implied.*” Furthermore, the Employee
 6 Acknowledgement Form states, “[t]his Handbook should not be
 7 construed, nor does it constitute, any kind of ‘employment contract,’ . . .
 8 Nothing in this Employee Handbook creates or is intended to create a
 9 promise or representation of continued employment. All employment
 10 with the Company is at-will. . . Employment at-will is the sole and entire
 11 agreement between the company and you concerning the duration of
 12 your employment and the circumstances under which your employment
 13 may be terminated.”

14 (Employee Acknowledgement Form, Ex. 14.) (emphasis added.) Therefore, Vision is precluded
 15 from arguing that the Vision 767 Memorandum constitutes an employment contract because it
 16 repeatedly disclaims such liability in its Employee Handbook and the Employee
 17 Acknowledgement Form. *See Vargas*, 901 P.2d at 697; *D’Angelo*, 819 P.2d at 209 n.4.

18 v. *To the extent that Vision’s claim is for breach of the Vision 767*
 19 *Memorandum, it fails because the memorandum does not include a*
 20 *provision that governs confidential or classified information and Vision*
 21 *has offered no evidence that Hester breached any such provision.*

22 The Vision 767 Memorandum does not contain any provision that governs classified or
 23 confidential information. (*See Vision 767 Memorandum*, Ex. 18.) Thus, Hester could not have
 24 breached any such provision, as no provision exists. Furthermore, as Dagget testified, since his
 25 employment at Vision began in February, 2007 (Dagget Dep., Ex. 6, at 9), Vision has not been
 26 in possession of any classified material (*id.* at 119) and the Closeout Certification for the Air
 27 Bridge Program contract for the period prior to that confirms that Capital Aviation furnished no
 28 classified material to Vision (Ex. 23, at CAI 25530). Accordingly, Vision had no classified
 information to provide to Hester and therefore Hester had no classified information to disclose.
 In addition, whether the information contained in the Complaint and the Las Vegas Sun Article
 was classified or confidential is of no moment, because Hester testified that the only
 information that he provided for the Complaint was the background information contained in

1 paragraph 2 (Hester Dep., Ex. 10, at 181). Furthermore, Hester testified that he was not the
 2 anonymous source cited in the Las Vegas Sun Article (*id.* at 209-10) and Vision has offered no
 3 evidence to prove that he was the anonymous source. (Dagget Dep., Ex. 6, at 128, 135-36, 139,
 4 141, 154-57); (Meers Dep., Ex. 22, at 521.)

5
 6 **D. THE NON-DISCLOSURE PROVISION OF VISION'S NON-DISCLOSURE**
 7 **AGREEMENT SHOULD BE STRUCK DOWN BECAUSE IT IS**
 8 **OVERBROAD AND UNREASONABLE**

9 The non-disclosure provision of Vision's Non-Disclosure Agreement should be struck
 10 down because it is overbroad and unreasonable. While no Nevada court has articulated the
 11 standard for determining whether a non-disclosure provision is valid, other jurisdictions have
 12 held that non-disclosure covenants "are subject to reasonableness requirements." *Prudential Ins.*
 13 *Co. of Am. v. Baum*, 629 F. Supp. 466, 469 (N.D. GA 1986) (applying Georgia law); *see also*
 14 *Thomas & Betts Corp. v. Panduit Corp.*, 1999 WL 261861, at *2 (N.D. Ill Apr. 8, 1999) (same);
 15 *N. Am. Paper Co. v. Unterberger*, 526 N.E.2d 621, (Ill. App. 1st Dist. 1988) (holding that non-
 16 disclosure provision was "so overbroad, unreasonable and burdensome" that it far exceeded the
 17 employer's protectable interest). Non-disclosure requirements are subject to a reasonableness
 18 standard because "they affect the dissemination of information necessary to free competition
 19 among businesses." *Baum*, 629 F. Supp. at 469; *see also Nasco, Inc. v. Bimbert*, 239 Ga 675,
 20 676 (Ga. 1977). "Unlike general noncompetition provisions, however, specific nondisclosure
 21 clauses bear no relation to territorial limitations and their reasonableness turns on factors of time
 22 and the nature of the business interest sought to be protected." *Baum*, 629 F. Supp. at 469
 23 (quoting *Durham v. Standy-By Labor of Georgia, Inc.*, 230 Ga. 558, 563 (Ga. 1973). Here,
 24 Vision's non-disclosure provision is unreasonable because it does not contain a time limitation
 25 and it seeks to protect information beyond Vision's protectable interests.
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i. *Vision's non-disclosure provision is unreasonable and should be struck down because it does not contain a time limitation.*

Vision's non-disclosure provision is unreasonable and should be struck down because it does not contain a time limitation. Courts have found that "nondisclosure covenants [are] unreasonable and therefore unenforceable if [they] lack[] any time limitation." *Baum*, 629 F. Supp. at 470; *Thomas v. Best Mfg., Corp.*, 234 Ga. 787, 788 (1975); *see also Aladdin, Inc. v. Krasnoff*, 214 Ga. 519, 520 (Ga. 1958) (invalidating non-disclosure covenant unlimited as to time or territory because "[c]onceivably, this would include all of the plaintiff's customers from the time of its incorporation to that time in the unforeseeable future when it shall cease to do business.")

Here, Vision's non-disclosure provision states:

During employment, and thereafter, Employee shall not, directly or indirectly, voluntarily or involuntarily, disclose to any person or entity any Confidential Information of Employer. For the purposes of this Agreement, "Confidential Information" shall include, but is not limited to, any of Employer's confidential, proprietary or trade secret information disclosed to Employee or Employee otherwise learns in the course of employment such as, but not limited to, business plans, customer lists, customer names, customer contact information, price lists, financial statements, software diagrams, flow charts and product plans.

(Vision Non-Disclosure Agreement, Ex. 13, at 2.) Thus, Vision's non-disclosure provision contains no time provision and continues in perpetuity. Accordingly, Vision's non-disclosure provision is unreasonable and should be struck down due to this infirmity. *See Baum*, 629 F. Supp. at 470; *Thomas*, 234 Ga. at 788; *see also Aladdin* 214 Ga. at 520.

ii. *Vision's non-disclosure provision is overbroad and should be struck down because it exceeds its protectable business interests.*

A non-disclosure provision is unreasonable if it exceeds the protectable interests of the employer. *Trailer Leasing Co. v. Assoc. Commercial Corp.*, 1996 WL 392135, *1 (N.D. Ill. 1996) (holding that provision barring employee from disclosing "any methods and manners" of the business without limitation was unreasonable). Moreover, an agreement prohibiting the disclosure of any and all information about innumerable categories of information will not be

1 enforced. *See N. Am. Paper*, 526 N.E.2d at 623-24 (holding that agreement prohibiting
 2 employee from disclosing any information about “manufacturing, purchasing, research,
 3 development methods, practices, accounting, suppliers, marketing, merchandising, customers [],
 4 distribution, sale or use of any and all [products],” and “any and all items of whatever nature or
 5 kind which the employee has learned of, acquired or obtained knowledge of” during his
 6 employment was so “overbroad, unreasonable and burdensome” that they far exceeded any
 7 protectable interest of employer).

9 Here, Vision’s non-disclosure provision is so vague that it defines confidential
 10 information in such a manner that it fails to inform Hester what information it includes or
 11 excludes. Specifically, the vagueness of the provision is derived from the definition of
 12 “Confidential Information,” which states, “Confidential Information shall include, but is not
 13 limited to” (Vision Non-Disclosure Agreement, Ex. 13, at 2.) The fact that Vision fails to
 14 limit what constitutes confidential information in its definition means that all of Vision’s
 15 information must be treated as confidential, because employees are unable to discern what
 16 Vision may consider confidential. Accordingly, Vision’s non-disclosure provision includes
 17 information beyond its protectable interests. *See Trailer Leasing*, 1996 WL 392135, at *2-4.
 18 Moreover, the categories that Vision enumerated, “business plans, customer lists, customer
 19 names, customer contact information, price lists, financial statements, software diagrams, flow
 20 charts and product plans” are overbroad, unreasonable, and burdensome because they exceed
 21 Vision’s protectable business interest and include information that Vision itself has never treated
 22 as confidential. (*See* Vision’s Bill of Particulars, Ex. 20, at 1-5 (identifying the type of
 23 “sensitive” air transportation services it provided for the United States government, the arrival
 24 and destinations of the Air Bridge Program flights, the companies that it contracted with, and the
 25 terms of its financial relationship with CSC and Capital Aviation); *N. Am. Paper*, 526 N.E.2d at
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623-24; *see also Neal v. Griepentrog*, 837 P.2d 432, 435 (1992) (recognizing that not every customer pricing list is a trade secret).)

E. VISION FAILED TO DEMONSTRATE THAT ANY OF ITS INFORMATION IS TRULY CONFIDENTIAL

Courts have long held that an employer's information is not confidential for purposes of a non-disclosure agreement where that information has been publicly disclosed by the employer or is widely available in the public domain. *See Nmotion, Inc., v. Environmental Tectonics Corp.*, 148 Fed. Appx. 591, 592, 2005 WL 1899286, at * 1 (9th Cir. Aug. 4, 2005) (holding that plaintiff could not sustain claim for breach of non-disclosure agreement where plaintiff previously publicly disclosed the allegedly confidential information subject to the claim); *Rugen v. Interactive Bus. Sys., Inc.*, 864 S.W.2d 548, 552 (Tex. App. 1993) (holding that information is only confidential where it "is not generally known or readily ascertainable by independent investigation"); *Van Prods Co. v. Gen. Welding & Fabricating, Co.*, 213 A.2d 769, 778-779 (Pa. 1965) ("there is considerable authority to the effect that public sale of the article in question or description thereof in literature available to the public will destroy an[y] trade secret which the inventor might have had") *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 901 (Min. 1983) ("To put it another way, the employer must come into court with clean hands; the employer cannot complain of the employee's use of information if the employer has never treated the information as a secret.").

Here, the information contained in paragraphs 7 and 11 of the Complaint does not disclose Vision's confidential information, as it states "aircraft arriving and departing" and does not specifically identify that these are Vision's procedures. [D.E. 1, at ¶ 11.] In addition, this information has been published in numerous newspaper articles prior to this litigation and by the United States government. (*See Exs.*, 1, at 4; 2, at 1; 3, at 22; 12, at 1.) The information provided in the Las Vegas Sun Article by the anonymous source was contained in the European

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Union Parliament Report, which was published years before this litigation. (EU Report, Ex. 11, at 10-13, 23.) Finally, Vision disclosed all of its allegedly confidential information in its public filings in Fairfax County, including: (1) that it was a subcontractor for the United States government; (2) that it operated “sensitive air transportation services” on behalf of the United States government from Frankfurt, Germany, and Washington, DC, to Kabul and Baghdad; (3) that it contracted with Capital Aviation, CSC, and McNeil; (4) and disclosed all of the financial terms of its agreements with Capital Aviation and CSC. (Vision’s Bill of Particulars, Ex. 20, at 1-5.) Thus, none of the information Vision claims is confidential is actually confidential as it has either been previously disclosed in the public record by Vision, the United States government, the European Union Parliament, or various news agencies.⁷

Regardless, it is of no consequence whether Vision’s information is confidential because Vision has failed to offer any proof that Hester disclosed Vision’s purportedly confidential information.⁸ In fact, the evidence conclusively demonstrates that Hester did not disclose any of Vision’s purportedly confidential information. Vision claims that its purportedly confidential information was disclosed in paragraphs 7 and 11 of the Complaint and by an anonymous source cited in the Las Vegas Sun Article.⁹ However, Hester testified that the only information

⁷ Vision has failed to offer any evidence in support of its damages and therefore its breach of the confidentiality and non-disclosure agreement claim must be denied. Specifically, in response to Plaintiff’s Second Set of Interrogatories, Vision acknowledged that it has not lost any contract related to this litigation or suffered any damages. (Ex. 24, at 12.)

⁸ Dagget testified that as to paragraphs 12, 13, 14, 15, 16, 17, and 18 of Vision’s Amended Counterclaims that Vision did not have any information that supported its allegations, other than the fact that there was a Complaint filed in this action and that shortly thereafter the Las Vegas Sun Article was published about this litigation. (Dagget Dep., Ex. 6, at 154-157.) Thus, Vision has acknowledged that there is no basis for its claim that Hester was the source quoted in the Las Vegas Sun Article, and in fact, he was not.

⁹ Dagget, who testified as one of Vision’s Rule 30(b)(6) representatives, stated that the only information that Vision claimed was confidential was that Vision operated flights to Baghdad and Kabul (Dagget Dep., Ex. 6, at 135), and was not aware of any other confidential information purportedly released by Hester. However, this information could not possibly be confidential as Vision has not treated it as such. First, Vision files its flight plans in advance as a matter of public record, these identify the destinations of their flights (Jensen Dep., Ex. 7, at 20-21), and Vision

1 contained in the Complaint that he provided was the information contained in paragraph 2, which
 2 was his own personal background information, and Vision has no proof to the contrary. (Hester
 3 Dep., Ex. 10, at 181.) Similarly, Hester also testified that he “has never spoken with any reporter
 4 from the Las Vegas Sun or any other newspaper” regarding “Vision Airlines,” (*id.*, at 209-10),
 5 and again Vision has no proof to support its baseless allegations.¹⁰
 6

7 **III. CONCLUSION**¹¹

8 Vision has embarked on a campaign of intimidation against Plaintiff and the Class. It has
 9 filed not only its Amended Counterclaims in this action, but has sued other Class members in at
 10 least one other action. This campaign is part of Vision’s effort to deter the Class from the
 11 prosecution of its lawsuit to recover the hazard pay that the Class has earned. Vision filed its
 12 Amended Counterclaims alleging that Plaintiff disclosed classified information, even though
 13 Vision knew full well that it did not have any classified information to provide to Hester for him
 14 to disclose or even any evidence to support its claim that Hester disclosed the allegedly classified
 15 information. Vision made these allegations without any good faith basis – really without any
 16 basis whatsoever – as evidenced by the testimony of its Rule 30(b)(6) witnesses. Vision now
 17 attempts to mislead this Court that the very information it has disseminated into the public
 18 domain is somehow confidential. For the foregoing reasons, Hester respectfully requests that the
 19 Court grant his Motion for Summary Judgment on Vision’s Amended Counterclaims.
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25 disclosed this information in its Bill of particulars, which was also filed as a matter of public record in its litigation
 in Fairfax County, Virginia (Bill of Particulars, Ex. 20, at 2).

26 ¹⁰ Dagget testified that Vision did not have any evidence to substantiate its claim that Hester was the anonymous
 27 source cited in the Las Vegas Sun Article. (Dagget Dep., Ex. 6, at 140.)

28 ¹¹ Vision’s claim for declaratory and injunctive relief is defective for the same reasons Vision’s claim for breach of
 the confidentiality and non-disclosure agreements fail, and Plaintiff respectfully requests that such relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served via the Court's CM/ECF system on July 29, 2010 on Harold P. Gewerter, Esq., 2705 Airport Drive, North Las Vegas, Nevada 89032.

By: /s/ David M. Buckner
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